

PAUL FUNK
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 94-356

Decided December 17, 1999

Petition for discretionary review of an Administrative Law Judge decision sustaining the Office of Surface Mining Reclamation and Enforcement's failure to abate cessation order No. 90-84-134-001 and the resulting penalty of \$22,500 for the failure to abate. NX 90-11-P.

Reversed in part; set aside in part; vacated in part.

1. Administrative Procedure—Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure—Surface Mining Control and Reclamation Act of 1977: Civil
Penalties: Discretionary Review

Under section 518 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268 (1994), any party charged with a civil penalty may file a petition for discretionary review of a proposed assessment of that penalty. Under 43 C.F.R. § 4.1155 OSM has the burden of going forward to establish a prima facie case that a violation of pertinent requirements occurred. That burden in a challenge to a failure to abate cessation order involves providing evidence that conditions supporting the issuance of an imminent harm cessation order existed and that those facts remained unabated, justifying the existence of a failure to abate cessation order.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

OSM fails to make a prima facie case when it presents insufficient evidence to establish whether the mining operation in question was responsible for a disturbed area claimed incidental to the

petitioner's mining operation or whether the disturbed area was the result of a preceding mining operation, and thus fails to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

3. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

Under 30 C.F.R. § 700.11(b), a surface coal mining operation was not exempt from regulation under SMCRA under the "2-acre exemption" where that operation, together with any "related" operations, had an affected area of 2 acres or more. Under 30 C.F.R. § 700.11(b)(2), operations were deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." The "physically related site" criteria, which were promulgated in 30 C.F.R. § 700.11(b)(2) on July 2, 1982 (47 Fed. Reg. 33431), could be applied retroactively to determine whether operations in 1981 were eligible for the 2-acre exemption.

4. Surface Mining Control and Reclamation Act of 1977: Generally--Surface Mining Control and Reclamation Act of 1977: Applicability: Generally--Surface Mining Control and Reclamation Act of 1977: Exemptions: 2-Acre

A State permittee with a 2-acre permit obtained in good faith and after the submission of accurate and complete information, and upon which he relied in carrying out mining operations, was protected from OSM citation for violations occurring prior to the date of the OSM reversal of the 2-acre permit pursuant to 30 C.F.R. § 700.11(c).

APPEARANCES: Billy R. Shelton, Esq., Baird, Baird, Baird and Jones, Pikeville, Kentucky, for appellant; J. Nicholas Holt, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Paul Funk (Funk, appellant, or petitioner) seeks review of a January 5, 1994, decision by Administrative Law Judge (ALJ or Judge) David Torbett sustaining failure to abate cessation order (FTACO) No. 90-84-134-001 and affirming a civil penalty assessment order issued by the

Office of Surface Mining Reclamation and Enforcement (OSM or respondent) in the amount of \$22,500. In the decision, Judge Torbett held that Funk, as operator, had violated Kentucky Two-Acre Permit No. 067-0090 by mining 2.23 acres.

The procedural history is relatively simple. On November 22, 1989, OSM issued Funk imminent harm cessation order (IHCO) No. 89-84-134-020 for exceeding 2 acres of surface disturbance during surface coal mining operations on Kentucky Permit No. 067-0090 between October 1981 and February 1982. During a follow-up inspection on January 2, 1990, OSM determined that no remedial action had been taken and issued Funk FTACO No. 90-84-134-001. Funk did not file applications for review of either cessation order (CO). OSM issued a proposed civil penalty in the amount of \$1,800 for the IHCO, but Funk did not request an assessment conference or file a petition for discretionary review (PDR) thereof. However, when OSM issued a proposed civil penalty in the amount of \$22,500 (\$750 a day for 30 days) for the FTACO, Funk requested an assessment conference concerning that penalty. At the conclusion of this conference, Funk prepaid the \$22,500 and filed a PDR of this penalty, challenging the two underlying CO's. Funk alleged that his mining operation did not exceed its 2-acre limit and that he was exempt from regulation under the Kentucky Regulatory Program.

The matter went before Judge Torbett. The issues presented before him were whether Funk's PDR was untimely as to the underlying IHCO, whether the area mined was in excess of 2 acres, whether the site was related to another site and did not qualify for the 2-acre exemption, and whether the penalty assessed was proper.

In his decision, the ALJ determined first that petitioner was not barred from adjudicating the facts in the underlying IHCO because he had not initially requested review of the IHCO within the time prescribed.

The regulations themselves that a failure to file an application for review of an order of cessation does not preclude the Petitioner from challenging the fact of violation during the civil penalty proceeding. 43 C.F.R. § 4.1163 (1992). Further, 43 C.F.R. § 4.1155 [1992] contemplates that the fact of violation and the civil penalty will be determined in the same proceeding.

(Decision at 6.)

In ruling upon whether Funk's mining activities affected more than 2 acres, the ALJ determined:

Although Respondent's inspector believed Petitioner had mined 4.6 acres, his calculations were based upon the eight-year old memories of the inspector who had visited the site before leveling for house sites had begun. (Tr. 28, 47, 85-86.) OSM's inspector had never visited the site during mining.

No other witnesses believed Funk had mined the right-hand side of the hollow included in OSM's violation. ([Tr.] 102, 152, 152.)

However, Mr. Funk himself d that he had used the previously mined area which lay between his spoilage storage and his mining site. (Tr. 185-186.) This area was estimated to be .46 acres by the surveyor Funk hired. (Tr. 187, 195.) Petitioner had previously admitted to mining 1.77 acres which included .65 acres for coal removal, .43 acres for coal spoilage, and .69 acres of haul road[.] (Tr. 168.) The additional .46 acres would bring the total affected area to 2.23 acres. Even if Petitioner only mined about 300 feet of his coal removal area, as he d, he would have traversed about two-thirds the length of the non-permitted area to reach the almost half acre of spoil storage. It is illogical to believe that he brought each load of spoil to a particular spot on unpermitted ground, crossed there each time, discharged the spoil over the [.43] acres below, and returned to his mining across the same small spot of unpermitted ground.

A surface coal mining operation includes the areas upon which activities described in 30 C.F.R. § 700.5(a) occur or where such activities disturb the natural land surface. These areas also include any adjacent land the use of which is incidental to any such activities. 30 C.F.R. § 700.5(b) (1993).

(Decision at 7.)

As Judge Torbett determined that Funk had exceeded his 2-acre permit, and thus sustained the underlying CO, he found it unnecessary to reach the issue of whether the Omer Champion permit No. 067-0090 was related to any other mine. (Decision at 8.)

The final issue addressed by Judge Torbett relates to the penalty imposition. Funk argued before Judge Torbett that assessment of the \$22,500 penalty is improper because he acted in good faith in making a complete, accurate request for an exemption and relied upon the State of Kentucky's decision to grant it, and therefore should not be cited for violations which occurred prior to OSM's reversal of the State's decision. Petitioner claims that 30 C.F.R. § 700.11(c) precludes OSM from citing a permittee for violations occurring prior to the date of OSM's reversal of a State's grant of exemption if a written determination of exemption (such as a 2-acre exemption) had been obtained in good faith by a permittee, and he had relied upon it. Id.

Judge Torbett determined, however, that although petitioner had obtained the 2-acre exemption from the of Kentucky in good faith and had relied upon that exemption, he forfeited his opportunity for review of the amount of the \$22,500 civil penalty by paying the \$1,800 civil penalty

assessed for the underlying IHCO (which was based upon a determination that Funk was not entitled to a 2-acre exemption) and then not seeking review of that assessment or the FTACO which followed. (Decision at 8, distinguishing Patrick Coal Co. v. OSM, 661 F. Supp 380 (W.D. Va. 1987).) 1/

Judge Torbett had previously denied petitioner's Motion to Enforce Settlement and had declined to enforce the settlement petitioner alleged he had entered into with OSM, ruling he lacked authority to enforce the agreement against OSM. See September 7, 1993, Order.

In his PDR, petitioner claims the following errors:

1. ALJ Torbett's Decision that the disturbed acreage associated with Permit No. 067-0090 exceeded two acres is clearly erroneous, contrary to law and fact and is not supported by substantial evidence of record.
2. ALJ Torbett's Decision to overrule the applicant's Motion to Enforce Settlement and not to enforce the settlement entered into by the applicant and the respondent was clearly erroneous and contrary to law and fact.
3. ALJ Torbett's Decision that 30 CFR Section 700.11(c) does not preclude the assessment of civil penalties by the respondent is clearly erroneous and contrary to law and fact.

(PDR at 1-2.) For these reasons, petitioner has asked that the Board reverse the decision issued by Judge Torbett and "that the citation issued by the respondent be vacated." (PDR at 2.) On May 23, 1994, we granted Funk's PDR. 2/

1/ The petitioner in the Patrick case argued that OSM was prevented from issuing a CO to it because of its reliance on the State's 2-acre exemption. In holding against the petitioner, the court said that although OSM may issue valid notice of violations and CO's in spite of a state's determination of exemption, 30 C.F.R. § 700.11(c) prevented OSM from penalizing Patrick for his reliance prior to the time the State's determination was reversed.

2/ We held therein that Board review of a decision of an Administrative Law Judge decision addressing assessment of a civil penalty may be sought by filing a PDR under the procedures set forth at 43 C.F.R. § 4.1270(a).

The regulations provide that a "notice of appeal" is the appropriate way to seek review of orders or decisions of an Administrative Law Judge which dispose of a proceeding "except a civil penalty proceeding under § 4.1150." 43 C.F.R. § 4.1271(a). Thus, Board review of an Administrative Law Judge decision addressing assessment of a civil penalty may only be sought by filing a PDR under the procedures set forth at 43 C.F.R. § 4.1270. 43 C.F.R. § 4.1158. Funk's notice of appeal was not denominated as a "petition for discretionary review." However, we will nevertheless treat that document as a PDR in that Funk's appeal from Judge Torbett's

In his Statement of Reasons (SOR) and supporting brief (Brief), Funk first argues that he did not disturb the entire previously disturbed area between the active mining bench and the spoil disposal bench. (Brief at 8.) Although he concedes that, had he disturbed the entire 0.46 acres making up this intermediate area, he would have exceeded the 2-acre exemption (Brief at 9), he claims that the evidence showed that the "only portion of the area between the two benches that was disturbed was in the area of the hollow." Id. Petitioner further states:

This certainly makes sense, given the fact that a normal mining operation would need a place to put excess spoil during the excavation of the first one or two pits. From that point forward, the mining operation can actively reclaim the pits from which coal has been removed without placing additional spoil in the spoil disposal area. Funk testified that this is exactly what occurred thus making the pushing of spoil for the entire area between the two benches unnecessary. This is supported by OSM's own testimony which indicated that there were no pits that were left totally unreclaimed without any backfilling.

Id. Petitioner urges that Judge Torbett's ultimate conclusion regarding acreage disturbed "is not supported by substantial evidence and is in fact contrary to normal mining practice dealing with the handling of spoil." Id. Petitioner argues that if he "had only disturbed approximately one-half of the area determined by Judge Torbett to be totally disturbed, the entire disturbed area would only equal 2.00 acres." (Brief at 10.)

The second prong of petitioner's argument relates to the claim that ALJ Torbett's decision to deny Funk's Motion to Enforce Settlement was clearly erroneous and was contrary to law and fact. (Brief at 10.) Petitioner states on appeal:

[T]he parties agreed upon a proposal by which Funk would reclaim 400 feet of the mine bench in accordance with a reclamation plan, re-establish and maintain the access road and pay a civil penalty in the amount of \$750.00. After the acceptance of the settlement offer, the OSM attorney continually advised Judge Torbett that a settlement had been agreed upon and that he was preparing the necessary documents for finalization of the settlement agreement. After a delay of almost one year, Judge Torbett advised OSM that if the settlement documents were

fn. 2 (continued)

decision was timely and accepting it as a PDR will not prejudice OSM. Maynard v. OSM, 115 IBLA 49 (1990) (referring to Board order accepting a notice of appeal as PDR); The Hopi Tribe v. OSM, 107 IBLA 329 (1989) (a notice of appeal filed in a permit review proceeding accepted as a PDR under 43 C.F.R. § 4.1369(a)); McNabb Coal Co. v. OSM, 105 IBLA 29, 38 n.14 (1988) (accepting a notice of appeal as a PDR).

not finalized, this case would be dismissed in its entirety. Upon receipt of this Order, counsel for OSM informed counsel for Funk that the settlement proposal that at one time had previously been acceptable was no longer acceptable.

(Brief at 10-11.) Subsequent to the receipt of this letter from OSM's counsel, petitioner filed a Motion to Enforce Settlement. In denying the Motion in his September 7, 1993, order, Judge Torbett found that while the parties had entered into a valid, binding settlement agreement and that OSM had backed out of this agreement without good cause, he found that he, as an ALJ, did not have the authority or jurisdiction necessary to enforce this settlement against OSM. (Brief at 11.) In its Brief, petitioner argues that an ALJ possesses sufficient authority, pursuant to the regulation at 43 C.F.R. § 4.1121, to enforce the settlement.

Petitioner next argues that Judge Torbett's decision that 30 C.F.R. § 700.11(c) does not preclude the assessment of civil penalties in this case is clearly erroneous. Petitioner states, in pertinent part:

Earlier in his decision, Judge Torbett, relying upon the decision of this Board in Harman Mining Corp. v. OSM, 114 IBLA 291 (1990) found that Funk could challenge the underlying violation when contesting the failure to abate Cessation Order in a Section 518 proceeding. However, when reviewing this matter under Section 700.11(c), Judge Torbett finds that since Funk did not challenge the underlying Imminent Danger Cessation Order, he is not entitled to the benefit of this regulation or the holding in Patrick. As can be seen, this is clearly inconsistent, since Funk was able to argue the underlying violation in this proceeding, even though he had not filed a Section 518 or 525 appeal on the underlying violation. Thus the written determination of exemption was not reversed prior to the decision in this case. For this reason, OSM should not be allowed to assess a civil penalty against Funk for this violation.

(Brief at 13.)

In its Response to SOR (Response), OSM states that petitioner's challenge to the IHCO must be dismissed as untimely. Further, OSM states that the issues regarding the FTACO are limited to whether there was an abatement of the alleged violation. (Response at 11.)

OSM further claims that petitioner has failed to establish by clear proof that he was entitled to the 2-acre exemption, and that the facts demonstrate that the total area affected by Funk's coal mining operation exceeded 2 acres. OSM urges that appellant's own testimony establishes that more than 2 acres were disturbed. OSM claims the 0.46 acre of previously mined area between the benches must be added to the 1.77 acres petitioner identifies as having been disturbed because the 0.46 acre was incidental to his operation. (Response at 15-16.)

Equally important, OSM claims, the site did not qualify for the 2-acre exemption due to the doctrine of relatedness. (Response at 16.) Respondent states that OSM's regulations at 30 C.F.R. § 700.11(b) implemented the statutory exemption (30 U.S.C. § 1278 (1994)) and provided that the Act would be applied to all surface mining and reclamation activities except "the extraction of coal for commercial purposes where the surface coal mining and reclamation operation, together with any related operations, has or will have an affected area of two acres or less." (Response at 16 (emphasis supplied).) Under the regulations, respondent states, surface coal mining operations shall be deemed "related" if: (1) the operations occurred within 12 months of one another; (2) surface drainage from each operation flowed into the same watershed at a point within five aerial miles of either operation; and (3) the operations were under common ownership or control. Id.

In this case, OSM claims the evidence it offered at hearing proved that Funk's site was related to at least one other operation. Respondent presented evidence that another operation controlled by Funk was conducted by P.C. and H Contractors on Permit No. 067-0101, in which Paul Funk was a general partner. (Tr. 36; Response at 17.) The second site was a 14.17-acre disturbance which respondent claims was operated within 12 months of the Omer Champion site and that the confluence of drainage from the two sites was only 1.5 miles from the Omer Champion permit and 2.5 miles from the P.C. and H. permit. Id.

OSM next urges that Funk's Motion to Enforce Settlement was properly denied. Respondent claims that the determination of the Acting Associate Solicitor for Surface Mining (Robert More) that the settlement was unacceptable to the Department was consistent with "the responsibility of the Solicitor's Office to determine the legal sufficiency of a proposed settlement before it is presented to OHA for approval." (Response at 20.) OSM claims "it was Mr. More's opinion that the risks associated with litigating that case were insufficient to justify a waiver or drastic reduction in the penalty amount." (Response at 21.)

Finally, OSM states that 30 C.F.R. § 700.11(c) does not preclude assessment of the \$22,500 penalty, since petitioner did not make a good faith complete and accurate request for exemption. OSM argues that Funk violated the express condition of the 2-acre or less permit by exceeding 2 acres, and thus he cannot now rely on that permit as a defense under 30 C.F.R. § 700.11(c). (Response at 23.)

[1] OSM argues in its Response that, by failing to file a PDR of the proposed civil penalty for the IHCO, Funk waived his right to challenge the facts supporting the IHCO in any subsequent administrative action. Rather, it maintains, the issues regarding the FTACO are limited to whether there was an abatement of the alleged violation. (Response at 11-12.) We disagree.

Section 518 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1268 (1994), has been interpreted by the Department

via its promulgation of the SMCRA procedural regulations. Thus, under 43 C.F.R. § 4.1150, "any party charged with a civil penalty may file a petition for review of a proposed assessment of that penalty." Further, the petition must be filed either within 30 days of receipt of the proposed assessment (43 C.F.R. § 4.1151(a) or within 30 days after receipt of notice that the conference is complete, if (as here) a timely request for a conference was made. Under 43 C.F.R. § 4.1152(a)(1), the petitioner may make a "short and plain statement why * * * the fact of violation is being contested." Under 43 C.F.R. § 4.1155, "[i]n civil penalty proceedings, OSM shall have the burden of going forward to establish a prima facie case as to the fact of a violation." It is well established that, in order to make a prima facie case, OSM must present essential facts from which it may be determined that a violation of pertinent requirements has occurred. See Intersouth Mineral Co. v. OSM, 118 IBLA 14 (1991); Coal Energy, Inc. v. OSM, 115 IBLA 385 (1989); S & M Coal Co. v. OSM, 79 IBLA 350, 354, 91 I.D. 159, 161 (1984); Tiger Corp., 4 IBSMA 202, 205, 89 I.D. 622, 623 (1982); Rhonda Coal Co., 4 IBSMA 124, 131, 89 I.D. 460, 464 (1982).

None of this squares with the rigid interpretation of section 518(c) urged by OSM. (Response at 13-14.) Funk, as a petitioner for review of the \$22,500 proposed civil penalty had the right under 43 C.F.R. § 4.1151 to require OSM to establish a prima facie case that a violation of pertinent requirements occurred. In the present case, that burden involves making allegations that conditions supporting the issuance of the IHCO existed and that those conditions remained unabated, justifying the issuance of the FTACO. This is because, if conditions did not support issuance of the IHCO, then there was no ongoing violation to abate.

To hold otherwise would be to reward OSM for splitting up the civil penalty assessment process into phases and for effectively setting a trap for those who might be willing to accept a minor civil penalty without a fight, but who find it worth their time and effort to challenge a \$22,500 assessment. If we were to accept OSM's position, nothing would stop OSM from assessing a small civil penalty for an IHCO (anticipating that it will be accepted) and then barring a challenge to a much larger penalty and the accompanying FTACO. A fairer reading of the Act is that adopted in the regulations: whenever a party receives any proposed civil penalty assessment, he may challenge it and force OSM to make a prima facie showing that the underlying violation is supported by facts and that the amount of the assessment is correct.

The waiver language in section 518(c) can reasonably be read to bar collateral attacks from a civil penalty determination in court proceedings. The "admission" language in 43 C.F.R. § 4.1151(c) can be read as applying only to the specific assessment imposed but not challenged, such that "the civil penalty assessed" thereby becomes final for the Department.

[2] We next address the application of the 2-acre rule in this case. Funk argues that he did not violate the 2-acre exemption because he only disturbed "about half" of the 0.46 acres between the active mining bench

and the spoil disposal bench, and only that portion of the .46 acres should be added to the 1.77 acres he concedes was disturbed. (SOR at 8.) Appellant claims that the "only portion of the area between the two benches that was disturbed was in the area of the hollow." Id. OSM claims the entire 0.46 acre of previously mined area between the benches must be added to the 1.77 acres appellant identifies as having been disturbed because the 0.46 acre was incidental to his operation. (Response at 15-16.)

At the time of the alleged violation in this case, section 528(2) of SMCRA, 30 U.S.C. § 1278(2) (1994), provided that the Act would not apply to "the extraction of coal for commercial purposes when the surface mining operation affects two acres or less." ^{3/} Had the area in question been mined pursuant to a permit for a mine exceeding 2 acres, Funk would have been required by section 515(b)(3) of SMCRA, 30 U.S.C. § 1265(b)(3) (1994), to reclaim the site by eliminating the highwall and restoring the site to its approximate original contour. Hence, the controversy which led to issuance of the CO and this proceeding is directed to whether petitioner's surface coal mining operation exceeded 2 acres.

In this case, OSM's 1989 inspection was a result of the Two-Acre Task Force program established to implement the Save Our Cumberland Mountains settlement. ^{4/} Following that inspection, the IHCO issued, despite the earlier State clearance of the site and release of the bond. There is independent authority for issuance of the IHCO in this case. The regulations specifically provide that mining without a valid surface coal mining permit itself constitutes a practice which causes or can reasonably be expected to cause significant imminent environmental harm. Mining an area in excess of 2 acres on a 2-acre permit is such a practice. 30 C.F.R. § 843.11(a)(2); R.C.T. Engineering, Inc. v. OSM, 121 IBLA 142, 146 n.5 (1991); Slone v. OSM, 114 IBLA 353, 357 (1990); Firchau Mining, Inc. v. OSM, 101 IBLA 144 (1988).

The facts in the case show that petitioner disturbed approximately 1.77 acres at the site plus a portion of the 0.46 acres in the bench between the spoil site and the bench that was mined. Judge Torbett concluded that petitioner used all of the previously disturbed 0.46 acre

^{3/} By the Act of May 7, 1987, Pub. L. No. 100-34, 100 Stat. 300, Congress amended section 528(2) by eliminating that 2-acre exemption because it had "turned out to be the most misused and abused provision of SMCRA." H.R. Rep. No. 59, 100th Cong. 1st Sess. 3 (1987).

^{4/} On June 7, 1985, OSM reached a settlement in Save Our Cumberland Mountains v. Hodel, No. 81-2238 (D.D.C.), which required it to inventory surface mining operations in Virginia and Kentucky which claimed the 2-acre exemption and to conduct inspections and undertake enforcement in certain circumstances. To implement that settlement, OSM created a "Two-Acre Task Force."

area between the benches to move spoil, despite testimony presented by Funk under oath indicating only "about half" of the .46 acres was used. (SOR at 10.)

OSM's argument before Judge Torbett that the evidence showed a disturbance of more than 2 acres in an area previously mined prior to petitioner's mining operation was based upon the statements of Kentucky Inspector Hall to OSM Inspector James Holliday in spring 1989. Hall had not visited the site during the coal removal phase, having only visited the site on November 2 and December 3, 1981, prior to the extraction of coal, during the removal of some overburden. Neither Hall nor Holliday could testify from personal knowledge how much of the previously disturbed area between the benches was used by petitioner to move spoilage to the spoilage storage area during coal removal.

No Kentucky or OSM inspector who was on the site at the time Funk removed any coal from his operation testified at the 1994 hearing. More than 7-1/2 years had elapsed between the completion of mining and OSM's first inspection, which occurred after Kentucky's determination that the site was in compliance with its 2-acre exemption and release of petitioner's bond.

We find that OSM has presented no competent evidence to make a prima facie case that petitioner disturbed more than 2 acres during the mining period in issue which extended from October 1981 through February 1982, and thus has failed to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred. See Southern Appalachian Mining Corp. v. OSM, 146 IBLA 152 (1998). We thus find that OSM failed to make a prima facie case that petitioner disturbed more than 2 acres on Permit No. 067-0090.

The only witnesses who testified at the hearing who were present on site at or soon after the mining occurred were Funk, Omer Champion, and Ardell Champion. Their testimony supports the finding that less than 2 acres were disturbed. Omer Champion, the permittee on the site, testified that Funk had mined on the lefthand side of the hollow, but not on the righthand side, which would include a portion of the 0.46 acres in question. He testified that petitioner had graded the right side for home sites at the request of his father, Ardell Champion, prior to obtaining a permit for the mining operation, but that no coal removal had occurred in that area. (Tr. 102.) Ardell Champion, the owner of the surface estate, testified that no spoil was taken from the left side of the hollow and placed in the right side of the hollow as a result of the mining operation. (Tr. 142.) Ardell Champion testified that he prepared an "as mined" map to submit to the Kentucky Department of Surface Mining to get the bond released on the permit. He testified that this map showed the total disturbed area for the permit was less than 2 acres. (Tr. 144.) The determination by Judge Torbett that more than 2 acres was disturbed by Funk within the physical limits of Permit No. 067-0090 is vacated.

[3] We next turn to the issue of whether the relatedness doctrine requires we uphold the violation based upon the ground that the Omer Champion permit was related to the P.C. and H. permit. Although Judge Torbett did not address this issue in his findings in light of his determination that more than 2 acres were disturbed on Permit No. 067-0090, we do so now.

The "physically related site" criteria were promulgated in 30 C.F.R. § 700.11(b)(2) on July 2, 1982 (47 Fed. Reg. 33431), after the time that Funk was found to have operated the Omer Champion minesite. It is established that a retroactive application of these 1982 regulations is permissible to determine whether the mines are eligible for the 2-acre exemption. United States v. Lambert Coal Co., 649 F. Supp. 1470, 1475 (W.D. Va. 1986), aff'd, No. 87-2019 (4th Cir. Nov. 18, 1988).

Under 30 C.F.R. § 700.11(b), a surface coal mining operation is not exempt from regulation under SMCRA where that operation, together with any "related" operation, has or will have an affected area of 2 acres or more. Under 30 C.F.R. § 700.11(b)(2), operations are deemed "related" if (1) they occur within 12 months of each other; (2) they are "physically related"; and (3) they are under "common control." We shall address each of these three criteria seriatim.

As a factual predicate, the record reflects no dispute that Funk engaged in surface coal mining operations on the Omer Champion permit between October 1981 and February 1982. OSM alleges that Funk also "controlled" operations at the P.C. and H. site. James Holliday, an Inspector for OSM in the 1989 Two-Acre Task Force, testified concerning the relatedness of Permit No. 067-0090 (Omer Champion minesite), issued October 14, 1981, and Permit No. 067-00101 (P.C. and H. minesite), issued March 24, 1982. He testified that Permit No. 067-0101 encompassed 14.17 acres, that State inspection reports showed active mining to have occurred on the P.C. and H. site within 12 months of the active mining on the Omer Champion site, that the confluence of drainage from the 2 sites was only 1.5 miles from the Omer Champion permit and 2.5 miles from the P.C. and H. permit, and that Paul Funk was a listed owner or partner in P.C. and H. Coal Company, P.C. and H. Construction Company and P.C. and H. Contracting Company. (Tr. 34-36.)

Under 30 C.F.R. § 700.11(b)(2)(i), operations are deemed to be "physically related" if drainage from both operations flows into the same watershed at or before a point within 5 aerial miles of either operation. We find that Holliday presented sufficient evidence based upon his measurements on a topographic map, as testified at hearing, to make a prima facie showing that the two minesites were physically related. See Tr. 36. OSM was required only to present a prima facie case that Funk was covered by SMCRA; see 43 C.F.R. § 4.1155. This it did by the OSM inspector's testimony that the two operations drained into the same watershed within 5 miles of each other. (Tr. 36.) This testimony was un rebutted by Funk. Once OSM has made such a showing, the applicant for review then carries

the ultimate burden of persuasion. 43 C.F.R. § 4.1155. Specifically, when OSM makes its prima facie showing, the operator bears the burden of proving it is exempt from regulation under the 2-acre rule, as promulgated in 30 C.F.R. § 700.11(b). See Cumberland Reclamation Co., 102 IBLA 100, 104 (1988); OSM v. C-Ann Coal Co., 94 IBLA 14, 20 (1986). Funk has failed to rebut OSM's showing that the drainage from both operations flowed into the same watershed.

Finally, under 30 C.F.R. § 700.11(b)(2)(ii)(A), operations shall be deemed under "common control" if, inter alia, they are owned or controlled, directly or indirectly, by or on behalf of the same person. It is uncontested that Funk controlled mining activities on the Omer Champion minesite from October 1981 through February 1982. He was also a 40-percent owner with Herb Honeycutt and Carlos Fugate (each of whom owned 30 percent) in P.C. and H. Contractors when it obtained Permit No. 067-0101 to mine the 14.17 acre site, and when it began operations on that permit within 12 months of the February 8, 1982, termination on Permit No. 067-0090, based on Kentucky inspection reports. (Tr. 36, 162-63.) In requesting Permit No. 067-0101, the P.C. and H. application listed Funk, Honeycutt, and Fugate as principals of P.C. and H. Contractors. That application also listed Funk, Honeycutt, Fugate and Omer Champion (on-site) as involved in Permit No. 067-0090, in the section addressing other mining operations of the applicants. See Ex. R-16, para. A-9. Funk testified that he shared control equally with the other owners of P.C. and H. Contractors. (Tr. 163.) OSM's evidence met its burden of making a prima facie showing that Funk exercised control at both sites.

Thus, we conclude that the relatedness doctrine did apply retroactively to the 2-acre permit issued as Permit No. 067-0090 in that Funk exercised control at both sites; that the Omer Champion operation was therefore not exempt from regulation under SMCRA; and that Funk was properly cited for the failure to reclaim violations that exist on the Omer Champion minesite.

[4] Funk, however, argues that assessment of the \$22,500 penalty is improper because he acted in good faith in making a complete, accurate request for the 2-acre State exemption and relied upon the State's decision granting it, and therefore should not be cited for violations which occurred prior to the date of OSM's reversal of the exemption. See 30 C.F.R. § 700.11(c). This section, Funk claims, precludes OSM from citing a permittee for violations occurring prior to the date of reversal if a written determination of exemption (the 2-acre permit) had been obtained in good faith by a permittee, and he had relied upon it. Id. The regulation states, in pertinent part:

The regulatory authority may on its own initiative and shall, within a reasonable time of a request from any person who intends to conduct surface coal mining operations, make a written determination whether the operation is exempt under this section. The regulatory authority shall give reasonable

notice of the request to interested persons. Prior to the time a determination is made, a person may submit, and the regulatory authority shall consider, any written information relevant to the determination. A person requesting that an operation be declared exempt shall have the burden of establishing the exemption. If a written determination of exemption is reversed through subsequent administrative or judicial action, any person who, in good faith has made a complete and accurate request for an exemption and relied upon the determination, shall not be cited for violations which occurred prior to the date of the reversal.

30 C.F.R. § 700.11(c) (emphasis supplied).

The facts support petitioner's claim of good faith. In October 1981, when Permit No. 067-0090 was obtained, Funk made a "complete and accurate request for an exemption." By then proceeding to operate, he relied upon the State's determination that he did not need a permit. We find that by disturbing less than 2 acres on Permit No. 067-0090, by having acted in the good faith belief that the State agency had authority to issue the 2-acre exemption, and by obtaining the exemption through a complete and accurate request, Funk was entitled to rely upon the provision within 30 C.F.R. § 700.11(c) above that provides that "any person who, in good faith, has made a complete and accurate request for an exemption and relied upon that determination, shall not be cited for violations which occurred prior to the date of the reversal." We further note that petitioner in this case, who received his permit and completed his mining prior to implementation of the "relatedness" regulation, had his bond released by State inspectors after completion of mining.

In light of our disposition of this case, we need not address petitioner's claim that his Motion to Enforce Settlement was improperly denied. 5/

In summary, we reverse the determination by Judge Torbett that petitioner disturbed more than 2 acres on Kentucky Two-Acre Permit No. 067-0090. We likewise find that although Kentucky Two-Acre Permit

5/ To the extent that OSM argues that the settlement was not binding absent approval by the Associate Solicitor for Surface Mining, it is correct. The Departmental Manual (DM) vests in the Solicitor the responsibility for all legal work in the Department of the Interior, except that performed by the Office of Hearings and Appeals and the Office of Congressional and Legislative Affairs. 109 DM 3.1. The DM also vests in the Solicitor the exclusive authority to compromise Departmental claims. 344 DM 1.3A, 4.1A. The Solicitor's Manual (SM) redelegates the authority to litigate and compromise claims under SMCRA to the Associate Solicitor, Division of Surface Mining (DSM). I SM 12.1A. Further, policy directives of both OSM and DSM establish guidelines for the compromise of civil penalties. See OSM Directive CAA-2 (as amended), DSM Manual 7.1.

No. 067-0090 may have been violated because of a related minesite controlled by petitioner on Permit No. 067-0101, the written exemption obtained by Funk in good faith from Kentucky State officials, and relied upon in his mining operations after the submission of complete and accurate information, precludes OSM from citing Funk for a violation occurring prior to the date of reversal. Accordingly, the penalty assessment resulting from the PTACO is vacated. The determination by Judge Torbett that there was a bona fide settlement agreement reached by the parties and that OSM improperly withdrew from that settlement is set aside.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed in part, set aside in part, and vacated in part.

James P. Terry
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

